Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1998

FRANKLIN PAREDES-RAVELO,
Plaintiff-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Was petitioner entitled to a Certificate of Appealability pursuant to 28 U.S.C. §2253 (c) (2) where the district court failed to apply a post-sentencing clarifying amendment to §1B1.3 of the Sentencing Guidelines, and is such a failure a complete miscarriage of justice.

PARTIES TO THE PROCEEDING

The parties to the proceedings are those named in the caption and Miguel D. Liriano, who was a co-defendant of the petitioner-appellant on trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKLIN PAREDES-RAVELO,

Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,

Respondent-Appellee.

PETITION OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Franklin Peredes-Ravelo petitions for a Writ of Certiorari to review an order of the United States Court of Appeals for the Second Circuit denying his application for a certificate of appealability.

CITATION TO OPINION BELOW

The order of the Court of Appeals appears in the Appendix hereto. The opinion of the district court denying petitioner's motion pursuant to 28 U.S.C. §2255 also appears in the Appendix hereto.

JURISDICTION

The order of the Court of Appeals was entered on March 11, 1999. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The testimony at trial established that prior to October 21, 1991, Nelson Almonte, a confidential informant working under the direction of the DEA, had negotiated on behalf of the undercover agent, Special Agent Lius Pizarro (the "U/C"), for the U/C to purchase ten kilograms of cocaine from Miguel Liriano at a price of $18,500 per kilogram.

On October 21, 1991, Agent Pizarro met with Liriano at the back office of St. Michael's Variety Store, located at 1258 St. Nicholas Avenue. Liriano confirmed that the price was still $ 18,500 per kilogram, but told Agent Pizzaro that there were only three kilograms immediately available. Liriano further explained that the other seven kilograms could be obtained by that evening from either of two sources. Liriano and Agent Pizarro agreed that the transaction would proceed later that day at the variety store.

During the conversation, petitioner entered the room where Pizarro and Liriano were. After petitioner entered the room, the conversation about the ten kilogram transaction continued, with Liriano and petitioner discussing with Agent Pizarro the additional cost of having additional quantities of cocaine transported to Virginia. Liriano then handed petitioner a key, and told him to go retrieve the cocaine, and meet him at an apartment in the vicinity of 150th Street and Broadway. Liriano told Agent Pizarro to come back to the store in twenty-five to thirty minutes.

Special Agents of the DEA followed petitioner and saw him enter a building at 3333 Broadway, located in the vicinity of 135th Street and Broadway, carrying an empty brown paper bag. Approximately fifteen minutes later, petitioner exited the building carrying the same bag, but now the bag appeared to be full. Petitioner then met Liriano at the apartment building on 150th Street and Broadway, and Liriano handed petitioner another set of keys. Petitioner went into the building, and then came out carrying the same bag. Both Liriano and Petitioner then entered their cars and drove back to the variety store. Agent Pizarro returned to the store to conclude the transaction, and after he verified that the contents of the bag were three kilograms of cocaine, petitioner and Liriano were arrested.

THE SENTENCE PROCEEDING

On September 25, 1992, petitioner was sentenced by the district court to thirteen years imprisonment. Petitioner's counsel argued that petitioner should only be sentenced based on the possession of three kilograms, and that he was entitled to a minor participant reduction. Despite such arguments, the district court sentenced petitioner based on his conviction of conspiring to sell ten kilograms of cocaine, which had a base level of 32, carrying a minimum sentence of ten years. The district court also imposed a two-point sentence enhancement because of the guns recovered from the apartment at 3333 Broadway. The district court declined to grant any reduction for petitioner's alleged minor participation in the transaction.

Petitioner filed a timely appeal to the United States Court of Appeals for the Second Circuit, challenging his sentence. The Second Circuit affirmed petitioner's sentence.

THE §2255 MOTION

Petitioner, *pro se*, based his §225 motion, in part, on the allegation that his counsel was ineffective for failing to challenge the Probation Department's determination of the quantity of narcotics involved in the case. Specifically, petitioner argued that he should be sentenced based only on a transaction involving three, not ten, kilograms of cocaine. The district court rejected these arguments and denied a certificate of appealability. The Court of Appeals also denied a certificate of appealability.

REASONS FOR GRANTING THE WRIT

1. The decision below raises a significant question: whether it is a complete miscarriage of justice for a district court to fail to apply post-sentencing clarifying amendment to the Sentencing Guidelines.

The relevant conduct guideline, §1B1.3, and its commentary and examples were substantially revised, effective November 1, 1992, approximately two months after petitioner was sentenced. Application Note 2 makes clear that in the case of jointly undertaken criminal activity, a defendant is responsible for the conduct of others only it "was both: (I) in furtherance of the jointly undertaken criminal activity; and (ii) reasonable foreseeable in connection with that activity." Note 1 adds that "[t]he principles and limits of sentencing accountability are not always the same as the principles and limits of criminal liability." Thus, a sentencing court must first determine the scope of each defendant's agreement with others,

and the determine whether drugs attributed to others were reasonably foreseeable to that defendant within the scope of the agreement. See also *United States v. Weekly*, 118 F.3d 576, 578 (8th Cir. 1997)("Relevant to the determination of reasonable foreseeability is whether the defendant demonstrated a substantial level of commitment to the conspiracy.")

Some Courts had previously held that knowledge or foreseeability alone were enough, but now require reasonable foreseeability within the scope of the jointly undertaken criminal activity. See, e.g., *United States v. Calrera-Baez*, 24 F3d 283, 288 (D.C. Cir. 1994)("mere foreseeability is not enough: someone wh belongs to a drug conspiracy may well be able to foresee that his co-venturers, in addition to acting in furtherance of his agreement with them, will be conducting drug transactions of their own on the side, but he is not automatically accountable for all of those side deals"); *United States v. Jenkins*, 4 F.3d 1338, 13146-47 (6th Cir. 1993)("to charge one participant in a conspiracy with the conduct of the other participants" requires a finding of foreseeability and conduct in furtherance of jointly undertaken criminal activity); *United States v. Irvin*, 2 F.3d 72, 75-78 (4th Cir. 1993) (in a drug conspiracy, "determine the quantity of narcotics reasonably foreseeable to each coconspirator within the scope of his agreement"); *United States v. Maserati,* 1 F.3d 330, 340 (5th Cir. 1993) ("Application Note 2 makes clear that criminal liability and relevant conduct are two different concepts, regardless of whether the indictment includes a conspiracy allegation"; *United States v. Garrido,* 995 F.2d 808, 813 (8th Cir. 1993) (simple knowledge that coconspirator possessed other drugs not enough – must show that those amounts were reasonably foreseeable and in furtherance of agreement); *United States v. Ismond,* 993 F.2d 1498, 1499 (11th Cir. 1993) ("to determine a defendant's liability for the acts of others, the

district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant.... Once the extent of a defendant's participation in the conspiracy is established, the court can determine the drug quantities reasonably foreseeable in connection with that level of participation").

Generally, the circuits have stressed the need for specific findings on the quantity of drugs that were reasonably foreseeable to each defendant. See *United States v. Anderson*, 39 F.3d 331, 353 (D.C. Cir 1994) (remanded for " specific, individualized findings regarding the quantity of drugs each appellant might have reasonably foreseen his or her agreed-upon participation would involve") *vacated in part on other grounds*, 59 F.3d 1323 (D.C. Cir. 1995) (en banc): *United States v. Rogers*, 982 F.2d 1241, 1246 (8th Cir. 1993) (remanded: finding that "by virtue of the conspiracy conviction" LSD sales attributed to codefendant are also attributable to defendant was insufficient statement of reasons). Here, the district court failed to make any specific findings on the quantity of drugs and also failed to apply the revised sentencing guidelines. A certificate of appealability should have been granted because the district court's errors constituted a fundamental defect which resulted in a complete miscarriage of justice: i.e., a prison sentence greater than required by the guidelines.

CONCLUSION

For these reasons, a Writ of Certiorari, should issue to review the Order of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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